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COURT OF CRIMINAL APPEALS
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In the Texas Court of Criminal Appeals

Burt Lee Burnett,
Appellant,

v.

The State of Texas,
Appellee.

On Discretionary Review from 11-14-00147-CR
Eleventh Court of Appeals

On Appeal from Cause No. 1-662-13
County Court at Law Number 1 of Taylor County, Texas

APPELLANT'S REPLY BRIEF ON THE MERITS

Frank Sellers
Texas Bar No. 24080305
FRANK SELLERS, P.C.
4200 West Vickery Blvd., Second Floor
Fort Worth, Texas 76107
P (817) 928-4222
F (817) 385-6715
frank@ftworthdefense.com

Allison Clayton
Texas Bar No. 24059587
THE LAW OFFICE OF ALLISON CLAYTON
P.O. Box 64752
Lubbock, Texas 79464
P (806) 773-6889
F (888) 688-6515
Allison@AllisonClaytonLaw.com

Attorneys for Appellant

ORAL ARGUMENT NOT GRANTED

LIST OF PARTIES & COUNSEL

Defendant/Appellant	**Trial and Appellate Counsel**
Burt Lee Burnett	Frank Sellers FRANK SELLERS, P.C. 4200 West Vickery Blvd., Second Floor Fort Worth, Texas 76107 Daniel W. Hurley HURLEY & GUINN 1805 13th Street Lubbock, Texas 79401 **Additional Discretionary Review Counsel** Allison Clayton THE LAW OFFICE OF ALLISON CLAYTON P.O. Box 64752 Lubbock, Texas 79464 **Additional Appellate Counsel** Aaron R. Clements HURLEY & GUINN 1805 13th Street Lubbock, Texas 79401
The State of Texas	**Appellate Counsel** Britt Lindsey TAYLOR CO. DISTRICT ATTORNEY'S OFFICE 300 Oak Street, Ste. 300 Abilene, Texas 79062 **Trial Counsel** Arimy Beasley Will Lundy TAYLOR CO. DISTRICT ATTORNEY'S OFFICE 300 Oak Street, Ste. 300 Abilene, Texas 79062
Trial Judge	Hon. Billy John Edwards Sitting by Assignment Taylor County Court at Law No. 1

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TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

Appellant Burt Lee Burnett respectfully submits this Reply Brief on the Merits in support of his request that the Court affirm the opinion below issued by the Eleventh Court of Appeals:

STATEMENT OF THE CASE

Appellant, a successful Abilene attorney, was convicted by a jury of Driving While Intoxicated (DWI) and Unlawfully Carrying a Weapon (UCW). CR74-79. In a published opinion authored by the Chief Justice, a unanimous Eastland Court of Appeals reversed the convictions, holding "there is no competent testimony upon which a rational juror could have found that [Burnett] consumed hydrocodone and that such consumption contributed to his intoxication." *Burnett v. State*, 488 S.W.3d 913, 923 (Tex. App.—Eastland 2016, pet. granted). Therefore, "[b]ecause the jury was permitted to find [Burnett] guilty of intoxication based on the introduction of pills into his system, . . . the jury charge error in this case caused . . . some harm." *Id.* at 925.

STATEMENT REGARDING ORAL ARGUMENT

The Court declined to grant oral argument in this case.

GRANTED QUESTION FOR REVIEW

> Did the court of appeals misapply this Court's decision in *Oullette v. State* in determining that the inclusion of the full statutory definition of intoxication in a jury charged constitutes harmful error?

STATEMENT OF FACTS

A. Officer Coapland arrests Burnett for DWI, finds pills in his possession.

In January 2013, Burnett rear-ended a vehicle driven by Michael Bussey, who was accompanied by passenger Nathan Chappa. 5RR91. Burnett's vehicle was inoperable. Brand new Abilene Police Officer Clinton Coapland arrived to investigate.

After noticing a faint odor of alcohol on Burnett's breath, Coapland began a DWI investigation. 5RR126, 128. Coapland administered field sobriety tests and concluded Burnett showed enough signs of intoxication to establish probable cause for an arrest. 5RR154. While conducting the search incident to the arrest, Coapland found twenty white pills and another single blue pill in one of Burnett's pockets. 5RR161.

B. Before trial, the court overrules Burnett's objections to Coapland's speculation about the pills and their effect.

Before jury selection, Burnett moved to suppress the arrest and made multiple oral objections to the evidence of, and testimony about, the pills. At the pretrial suppression hearing, Coapland testified:

- He was neither a drug recognition expert nor otherwise certified to recognize the effects of drugs on the human body. 3RR25.
- He agreed he "had no specialized training whatsoever to recognize any sort of impairment due to drugs." *Id.*

- His training only included how to "discover whether somebody is intoxicated due to alcohol and nothing else." 3RR 27.

Aside from having zero training in recognizing non-alcohol intoxication, Coapland never asked Burnett whether he ingested any medication that day. 3RR26. Instead, Coapland put "two-and-two together" to conclude that because Burnett possessed the medications, he "may have had some." *Id.*

The trial court expressed reservations about the State's intoxication evidence:

> "Well, that's going to come out probably in particular the definition of intoxication gets into a jury charge, you know. So the jury is going to know that it could be alcohol plus drugs of some sort to get to intoxication. ***I'm just saying it doesn't sound like the State has any evidence that drugs were part of the impairment, if there was an impairment***."

3RR66 (emphasis added).

The next morning, before opening statements, the court heard additional argument on Burnett's objections. The court viewed the arrest video, in which Coapland says he believes the pills in Burnett's pocket to be hydrocodone. 5RR13-14. The video also reflects the officer asking Burnett whether he had a prescription for the pills, to which Burnett responds he did. 5RR10. The prosecutor argued the pill evidence was same transaction contextual evidence. The court agreed, denying Burnett's motion to suppress

and overruling his objections, because the pills were "same transaction contextual evidence or *res gestae* of the offense." 5RR24.

C. On the first day of trial, Coapland shows and tells the jury about the pills, expressing his belief Burnett was intoxicated by them.

Initially, Coapland's testimony before the jury was identical to his testimony at the pretrial hearing. He told the jury about the pills he found in Burnett's possession and about his conclusion that "wow, this could have been what he's more intoxicated on." 5RR171-72. The video of the stop, which was played for the jury, shows Coapland expressing to another officer his belief that Burnett had not been drinking. *Id.*; SX1; SX2. Through Coapland, the State admitted into evidence the twenty white pills and one blue pill found on Burnett. 5RR183; SX7, SX8.

Coapland also testified he observed clues of intoxication on both the horizontal gaze nystagmus (HGN) and vertical gaze nystagmus (VGN) tests. 6RR80. The court then recessed for the evening.

D. The following day, Coapland admits his prior testimony was incorrect and that his training only allows him to detect alcohol impairment.

The next day, after doing some independent research overnight, Coapland changed his opinion and testimony. He explained he actually was not qualified to determine intoxication by anything but alcohol. Coapland

acknowledged publications from the National Highway Traffic Safety Administration (NHTSA) as reliable authorities,[1] and agreed:

- The NHTSA field sobriety testing manual he had been trained from teaches that VGN is associated only with certain drugs. 6RR78-79.[2]
- NHTSA's Advanced Roadside Impaired Driving Enforcement (ARIDE) Manual teaches that if he were truly intoxicated on hydrocodone, Burnett would not have shown the HGN indicators Coapland testified to observing. 6RR 78-79.[3]

Coapland then added:

> I am aware of that now. And I will admit, at the time – I'll admit I was not – I've heard that drugs impair you. I haven't been trained in it, so I didn't – you know, I thought all drugs might do it, but you are correct." 6 RR 80.

And later:

> [DEFENSE COUNSEL]: In other words, there is absolutely no evidence for this jury to conclude that he was intoxicated by anything other than alcohol, correct?
>
> [COAPLAND]: **None that I can say** because I'm not. I'm not certified in detecting drugs, and so that's -- I mean, that's correct.

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[1] *See* TEX. R. EVID. 803(18) (allowing cross examination from learned treatises and reliable authorities if they are not received in evidence).

[2] NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., DWI DETECTION AND STANDARDIZED FIELD SOBRIETY TESTING STUDENT MANUAL at VII–3 (emphasis added) ("Although this type of nystagmus was not addressed in the original research, field experience has indicated that the presence of Vertical Gaze Nystagmus has proven to be a reliable indicator of high doses of alcohol for that individual or ***certain*** *other drugs*."), *available at* http://www.tdcaa.com/sites/default/files/page/NHTSA%20SFST%20Student%20Manual%20200608.pdf.

[3] NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., ADVANCED ROADSIDE IMPAIRED DRIVING ENFORCEMENT (ARIDE), at V–10, VI–15-16, *available at* http://oag.dc.gov/sites/default/files/dc/sites/oag/publication/attachments/2007%20NHTSA%20ARIDE%20Manual.pdf [hereinafter ARIDE].

It's not saying he wasn't on drugs, but I'm saying I can't detect them. 6RR81 (emphasis added).

The State did not ask Coapland any questions about pill intoxication on redirect.

E. During the charge conference, the court overrules Burnett's objections to the court's inclusion of the full definition of intoxication in the abstract and application portions of the jury charge.

At the charge conference, Burnett objected to the following portions of the charge. 6RR129-30.

- The word "intoxicated" means the person does not have the normal use of his or her mental or physical faculties because of taking into his or her body alcohol, ***drugs, a controlled substance, or a combination of those, or any other substance***. CR65 (emphasis added).

- Now, if you find from the evidence beyond a reasonable doubt that on or about the 18th day of January, 2013, in Taylor County, Texas, the defendant, BURT LEE BURNETT while intoxicated by not having the normal use of his mental or physical faculties by reason of the introduction of alcohol, ***a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into his body***, did then and there drive or operate a motor vehicle in a public place, then you will find the defendant guilty of DRIVING WHILE INTOXICATED as charged in Count Two of the Information. CR65-66 (emphasis added).

The trial court overruled the objections and included the emphasized portions in the charge. 6RR134.

F. The jury convicts Burnett after the prosecutor emphasizes the pill evidence and highlights the pill intoxication portion of the jury charge.

In both her opening and rebuttal final arguments, the prosecutor argued Burnett could have been intoxicated by the pills:

- "alcohol, ***drugs, a controlled substance, or the combination of those, or any other substance***." 6RR148 (emphasis added);
- "You can consider . . . there are pills in evidence." 6RR173.
- "You heard the officer. He found a pill bottle. It might have been been [sic] for hydrocodone. He has no idea how many pills were in there, what the dosage was." *Id.*
- "You heard him say, 'After I found the pills, I didn't know what it was from.' He believed him to be intoxicated. He had lost the normal use of mental or physical faculties." 6RR174.

The jury convicted Burnett of DWI and UCW. 6RR183.

G. On appeal, a unanimous court reverses for harmful jury charge error.

Burnett appealed the conviction. *Burnett v. State*, 488 S.W.3d 913, (Tex. App.—Eastland 2016, pet. granted). After carefully comparing the *pill evidence* with the confusing lack of *pill intoxication evidence*, the appellate court held admitting the pill evidence was error.

> [T]he fact that the specific intoxicant is not an element of the offense does not give the State free reign to introduce possible intoxicants found at the scene in order to show intoxication when the State does not link the possible intoxicant to the defendant's intoxicated state by competent expert testimony.

Id. at 921. There was "no competent testimony upon which a rational juror could have found that [Burnett] consumed hydrocodone *and* that such consumption contributed to his intoxication. *Id.* (emphasis added). Because "only a portion of the statutory definition" was supported by the facts presented, the "trial court erred when it included the whole definition of intoxication in both the definition section and application paragraph of the jury charge." *Id.*

Finally, the pill evidence "was intertwined throughout the trial, and the State implied in its closing argument that [Burnett] could have been intoxicated due to pills." *Id.* at 925. Due to the central role the pill evidence played in combination with a jury charge authorizing the jury to convict based on a legal theory not supported by the evidence, Burnett suffered some harm. *Id.* Accordingly, the appellate court reversed the conviction. The State petitioned for discretionary review, which the Court granted. The instant appeal now follows.

SUMMARY OF THE ARGUMENT

After his overnight research, Officer Coapland made clear his testimony could only support intoxication by alcohol, not by pharmaceutical drug. This Court has consistently held a jury charge may only authorize a conviction on a particular legal theory when the theory is supported by some evidence. The trial court overruled Burnett's objections to the charge, which authorized the jury to convict him based on a prescription intoxication theory unsupported by the evidence. Authorizing the jury to convict Burnett based on a factually unsupported legal theory caused Burnett some harm.

ARGUMENT

A. This Court must first review the charge for error and then for some harm.

When reviewing jury charge error, this Court must determine whether the charge was erroneous, and if so, whether the error was harmful to the defendant. *Almanza v. State*, 686 S.W.2d 151, 171 (Tex. Crim. App. 1984)(op. on rehr'g). And where charging error was properly preserved, as it was here, the resulting conviction must be reversed if this Court finds "the presence of *any* harm, regardless of degree." *Arline v. State*, 721 S.W.2d 348, 351 (Tex. Crim. App. 1986) (emphasis in original). As explained below, authorizing the jury to convict Burnett of intoxication by anything other than alcohol was error that caused devastating harm.

B. The charge erred by authorizing the jury to convict Burnett for intoxication from anything other than alcohol.

The jury charge must set forth the "law applicable to the case." TEX. CODE CRIM. PROC. ANN. art. 36.14. The charge must do more than "merely incorporate the allegation in the charging instrument." *Gray v. State*, 152 S.W.3d 125, 127 (Tex. Crim. App. 2004). Rather, the charge should go further and "apply the law to the facts adduced at trial." *Id.* This is because "the jury must be instructed under what circumstances they should convict, or under

what circumstances they should acquit." *Id.* at 127-28 (internal citations and quotations omitted).

Including inapplicable definitions in even only the abstract portion (as opposed to both abstract and application portions) of the charge can be reversible error. *Chaney v. State*, 314 S.W.3d 561, 568 (Tex. App.—Amarillo 2010, pet. ref'd).

A jury charge failing to apply the law to the facts is erroneous. *Id.* Thus, a jury charge permitting guilt on multiple theories of intoxication is proper only when the evidence actually supports multiple possibilities of intoxication. *See Kirsch v. State*, 306 S.W.3d 738, 743 (Tex. Crim. App. 2010) (upholding *per se* intoxication jury charge when supported by evidence at trial). When no supporting evidence exists in the record, a trial court errs by authorizing the jury to convict based on inapplicable statutory definitions. *See Ouellette v. State*, 353 S.W.3d 868, 870 (Tex. Crim. App. 2011) (citing *Alvarado v. State*, 704 S.W.2d 36, 37, 39 (Tex. Crim. App. 1985)).

Two recent, similar DWI cases from this Court provide the groundwork for Burnett's complaint that because there was no evidence linking prescription possession to prescription intoxication, the jury charge should not have authorized a conviction on a prescription intoxication theory.

Oullette, 353 S.W.3d at 870; *Barron v. State*, 353 S.W.3d 879 (Tex. Crim. App. 2011).

C. *Oullette* held, when supported, the jury charge properly authorizes a conviction on a pill intoxication theory.

First, in *Ouellette*, the Court made clear when evidence supports a portion of the statutory definition of intoxication, the jury charge properly provides the law applicable to the case by defining and applying that portion. 353 S.W.3d at 870. In that case, the officer indicated he thought Ouellette was intoxicated by alcohol before he discovered the pills; he never testified whether his discovery of the pills altered his opinion of intoxication by alcohol. *Id.* Additionally, his testimony affirmatively linked pill possession with pill intoxication. The officer testified, without objection, that the pills found were central nervous system depressants "capable of causing the horizontal-gaze nystagmus he observed during the field sobriety tests." *Compare id.*, *with* 6RR81.

Accordingly, *Oullette* reasoned, although the drug intoxication evidence was "circumstantial and not obviously overwhelming, it [was] nonetheless present in the record." *Id.* The jury charge was valid because it was supported by record evidence. *Id.*

Judge Meyers dissented, suggesting the same problem present in this case to a worse degree: the drug evidence never should have been admitted

because no one was qualified to testify about drug intoxication. *Id.* at 871 (Meyers, J., dissenting).

D. *Barron* held when not supported, the jury charge improperly authorizes a conviction on a synergistic effect theory.

One month after *Oullette*, in *Barron*, the Court found reversible harm from a jury charge that included the synergistic instruction because there was no evidence of either drug ingestion or synergy to support the charge. *Barron*, 353 S.W.3d at 879. In *Barron*, the officer observed clues supporting intoxication and arrested Barron. The officer then found pills in Barron's possession. The officer did not collect the pills but did testify about finding them at trial. A video played at trial showed the officer audibly reading "hydrocodone" or "hydrocodeine" from the package. *Id.* at 881. The officer also testified "hydrocodone is a depressant and can cause horizontal and vertical gaze nystagmus. He said that he thought appellant was intoxicated 'due to alcohol or combination of drug and alcohol into the system.'"[4]

Additionally, a drug recognition expert testified generally about the effects of mixing hydrocodone and alcohol, as well as how mixing the two can have "a stronger effect," but the expert did not testify about a synergistic effect. *Id.* at 881. Because there was no evidence Barron had consumed any

[4] *Barron v. State*, 05-09-00589-CR, 2010 WL 2183281, at *2 (Tex. App.—Dallas 2010, pet. granted), *aff'd.*, 353 S.W.3d 879 (Tex. Crim. App. 2011).

of the pills or other medication, the Dallas Court found harmful jury charge error from including the synergistic effect instruction.[5]

> "[T]here is no evidence that the appellant ingested hydrocodone, hydrocodeine, or any other prescription medication on the day in question," and thus "the 'synergistic effect' instruction was not raised by the evidence."

Id. at 883 (quoting *Barron,* 2010 WL 2183281, at *3.). Although it would have conducted its harm analysis differently, this Court "agree[d] with the outcome."[6] *Id.* at 884.

E. The jury charge in the instant case was erroneous because the evidence did not support a prescription intoxication theory.

Both *Barron* and *Oullette* require some evidence of a particular theory of intoxication before a jury charge authorizes a conviction under that theory. In the case at bar, there was only evidence of prescription possession, not prescription intoxication.

It is the exact error confronted by the lower court in *Barron*, which went unchallenged in this Court: "'There is no evidence that [Burnett]

---

[5] The instruction read:

> You are further instructed that if a person by the use of medications or drugs renders herself more susceptible to the influence of intoxicating alcohol than she otherwise would be and by reason thereof became intoxicated from the recent use of intoxicating alcohol, she is in the same position as though her intoxication was produced by the intoxicating alcohol alone."

Barron, 353 S.W.3d at 881.

[6] Interestingly, the State did not seek discretionary review of the Dallas court's conclusion that "the 'synergistic effect' instruction was not raised by the evidence, and that the trial erred by so instructing the jury." *Barron*, 2010 WL 2183281, at *3.

ingested hydrocodone . . . or any other prescription medication on the day in question,' and thus 'the [prescription intoxication theory] was not raised by the evidence.'" *Barron*, 353 S.W.3d at 883 (quoting *Barron,* 2010 WL 2183281, at *3.) Even the underwhelming circumstantial evidence linking prescription possession to prescription intoxication present in *Oullette* is missing here.

By researching and concluding this was an alcohol only case, Officer Coapland made it simple—the charge should authorize a conviction on only an alcohol intoxication theory. Yet, over Burnett's objection, the charge also authorized a conviction on prescription intoxication. Because it authorized the jury to convict based on an unsupported prescription intoxication theory, the jury charge did not accurately set forth the law applicable to the case.

F. Misreading Judge Cocrhan's dissent in *Gray*, the State invites this Court to set a dangerous precedent by encouraging jury speculation.

In its brief, the State encourages this Court to sanction jury charges that always include the entire definition of intoxication regardless of whether the evidence supports such an instruction. The State bases its argument on Judge Cochran's dissent in *Gray*, which the State reads as a "warn[ing] against heading in the direction of forcing the State to prove the intoxicant rather than the intoxication." State's Brief on the Merits, 13 (citing *Gray v.*

State, 152 S.W.3d 125, 136 (Tex. Crim. App. 2004) (Cochran, J., dissenting)). But there are two major flaws in the State's argument.

First, in the part relied on by the State, Judge Cochran was criticizing the wisdom of requiring the State to *plead* a specific intoxicant. She lamented the Court's holding in *Garcia* which required the State plead the specific intoxicant, and then allowed a defendant to claim the State proved the incorrect intoxicant:

> This is a defense that is condoned, if not encouraged, by our decision in *Garcia* which requires the State to allege the precise substance that it thinks caused an impaired driver's intoxication, and then permits that driver to defend against the charge by claiming that he was intoxicated on some other substance.

Id. (criticizing *Garcia v. State*, 747 S.W.2d 379 (Tex. Crim. App. 1988)). Judge Cochran would have overruled *Garcia*, and held "the State need allege, *in its charging instrument*, only that the defendant drove or operated a motor vehicle in a public place while intoxicated. It need not allege any specific substance . . . ." *Id.* at 136-37 (emphasis added).[7]

The State confuses what is required in the charging instrument with what is required in the jury charge. Burnett agrees those are two different standards. It is not enough for the jury charge to merely incorporate the

[7] Judge Cochran also would have held that if the State does plead specific intoxicants, it must prove those specific intoxicants caused the intoxication at trial. *Id.* at 137.

allegation in the charging instrument. It must also apply the law to the facts adduced at trial.

Second, and more importantly, the majority and Judge Cochran in *Gray* agree the particular intoxicant is an evidentiary matter. *Id.* at 132 (majority op.) ("[T]he substance that causes intoxication . . . is an evidentiary matter."); *id.* at 137 (Cochran, J. dissenting) ("[T]he name of the substance is an evidentiary matter, not an element of the offense or a specifically defined statutory manner and means of committing the offense of DWI.").

As the Court noted, even though the State need not give notice of how it plans to prove intoxication, it must still offer evidence upon which the jury charge can be based. *Id.* at 132 (majority op.) (stating the charge must "apply the law to the facts adduced at trial"). Because the State specifically pled alcohol intoxication and *also* presented proof Gray was intoxicated by alcohol (to which he was made more susceptible *a la* his anti-depressants) the *evidence* supported the synergistic effect instruction. *Id.*

By contrast, the evidence in the case at bar did not support the trial court including anything but alcohol as one of the intoxicants supporting a conviction for DWI. There was *no* evidence supporting a conclusion Burnett was intoxicated by prescription medication. Even Coapland (after correcting his earlier testimony) agreed this was an alcohol-only intoxication case.

Accordingly the trial court should have only instructed the jury on alcohol intoxication.

The State asks the Court to set a dangerous precedent. According to the State, because it "is required to prove intoxication rather than the intoxicant," we should give the entire definition and let jury sort it out. It then gives an example in which a defendant provides a breath sample under .08 but the "defendant's own behavior is indicative that some other substance" causes him to appear impaired. The State's argument rests on a faulty premise.

As explained above, the State may only be required to *plead* intoxication generally (rather than the intoxicant), but before a jury charge may authorize a conviction, the evidence must include proof of the specific intoxicant to avoid the type of speculation described by the Eastland court below and this Court's opinion in *Hooper*. "[I]n the case before us, there is no competent testimony upon which a rational juror could have found that Appellant consumed hydrocodone and that such consumption contributed to his intoxication." *Burnett v. State*, 488 S.W.3d 913, 923 (Tex. App.—Eastland 2016, pet. granted) (quoting *Hooper v. State,* 214 S.W.3d 9, 15–16 (Tex. Crim. App. 2007) ("[J]uries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or

presumptions"; "[a] conclusion reached by speculation ... is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt")).

The type of unsupported speculation advocated by the State could ensnare thousands of innocent Texans. For example, those with naturally bad balance or those who appear to be mentally unstable could be convicted of being "intoxicated" when they have not consumed any substance at all.

Moreover, there is a growing number of people with medically-diagnosed chemical imbalances such as anxiety, bi-polar disorder, manic-depressive disorder, among others. If a person suffering from a chemical imbalance stops taking his medications, his appearance may become similar to someone who is intoxicated or impaired. Under the State's theory, the jury could convict that person of DWI because they did *not* consume the medications prescribed by a doctor to stabilize them. *See* Elizabeth D. Kantor, Trends in Prescription Drug Use Among Adults in the United States From 1999-2012, 314 JAMA 1819, 1825 (Nov. 3, 2015) *available at* http://jamanetwork.com/ journals/jama/fullarticle/2467552 ("the prevalence of prescription drug use increased from 51%in 1999-2000 to 59% in 2011-2012, while the prevalence of polypharmacy increased from8.2% to 15%."). Ironically in this scenario, doctors presumably prescribe these medications to help someone get back to

normal. But under our DWI law, and the State's proposed formulation, a jury could conceivably convict them because the accused appeared without the normal use of the mental faculties for *not taking* their medication.

The State's formulation also fails to account for the wealth of research on drowsy driving, yet another area where someone who has not consumed any substances may still appear impaired. Brian C. Tefft, *Acute Sleep Deprivation and Risk of Motor Vehicle Crash Involvement*, at 2 AAA FOUND. FOR SAFE DRIVING (Dec. 2016) ("Sleep deprivation has been shown to slow reactions to stimuli, decrease the accuracy of responses, and lead to long lapses in attention . . . all of which clearly have negative implications for safe driving.") (internal citation omitted) [8]; *see also National Survey of Distracted and Drowsy Driving Attitudes and Behavior* (NHTSA 2003). Even the prosecutor in Burnett's case recognized during voir dire that being tired could cause a person to "exhibit some signs of intoxication." (4RR 31).

Simply put, the wide-ranging and unjust implications of the State's proposal are frightening. This Court should decline the State's invitation to overrule a century of sound precedent requiring jury charges to include only definitions and applications raised and supported by the evidence. *Powell v.*

[8] *Available at* https://www.aaafoundation.org/acute-sleep-deprivation-and-crash-risk.

State, 60 Tex. Crim. 201, 203, 131 S.W. 590, 591 (1910) ("The jury is not authorized to convict on any state of facts not charged in the indictment, nor upon a state of facts not in evidence."). *Alvarado v. State*, 704 S.W.2d 36, 39-40 (Tex. Crim. App. 1985) (op. on reh'g) (finding error where jury charge failed to limit to proper portion of statutory definitions of mental state in injury to a child case); *Ferguson v. State,* 2 S.W.3d 718, 723 (Tex. App.—Austin 1999, no pet.) (reversing for failure to delete drugs and other intoxicants, including aerosol paint, from the charge's definition of intoxicated); *Chaney v. State*, 314 S.W.3d 561, 568 (Tex. App.—Amarillo 2010, pet. ref'd) (finding *egregious harm* where charge included improper abstract definition *mens rea* but properly restricted application to proper portion of definition).

Consistent with this Court's precedent, Burnett urges the Court to uphold the lower court's conclusion that the trial court erred by authorizing the jury to convict him on a jury charge that authorized a conviction on a legal theory without any evidentiary support.

G. The erroneous charge harmed Burnett.

Any harm requires reversal. *Arline v. State*, 721 S.W.2d 348, 351 (Tex. Crim. App. 1986). To determine whether Burnett was harmed, this Court must examine: (1) the entire jury charge, (2) the state of the evidence,

including any contested issues and weight of the probative evidence, (3) the arguments of counsel, and (4) any other relevant information in the entire record. *Abdnor v. State*, 871 S.W.2d 726, 733 (Tex. Crim. App. 1994)

Burnett shoulders neither a burden of proof nor a burden of persuasion in showing harm. *Warner v. State*, 245 S.W.3d 458, 464 (Tex. Crim. App. 2008).

Like in *Barron*, the "entire jury charge is important . . . because the charge contained a statute-based definition of intoxication" that included intoxicants other than alcohol. *Barron*, 353 S.W.3d at 884. The *Barron* court found harm because the charge went on to include the synergistic instruction when there was no evidence Barron had ingested anything other than alcohol nor was there evidence any ingestion would have made Barron more susceptible to alcohol alone—the very purpose of the synergistic instruction. *Id.* Even though the synergistic instruction has been held proper,[9] the *Barron* court agreed it was improper when lacking any evidentiary support.

Here, the record contained even less evidence of drug ingestion than the record in *Barron*. Coapland never even asked whether Burnett had taken

[9] *Gray*, 152 S.W.3d at 133 (upholding inclusion of the synergistic instruction because it was supported by the evidence). Interestingly, in *Gray* the evidence was clear that Gray had taken multiple anti-depressants, which when combined with alcohol would cause the synergistic effect. *Id.* at 127. The application paragraph of the jury charge, however, did not authorize the jury to convict Gray for being intoxicated on drugs alone—only on alcohol. *Id.*

any medications. 3RR26. No drug recognition expert testified about the effects of drugs, the effects of a combination, or the synergistic effect.

In other words, not only did this charge improperly define intoxication, it also then authorized a conviction for conduct wholly unsupported, and even refuted, by the evidence. If including the drug portion of the definition and adding and applying an unsupported synergistic theory of intoxication was harmful on the facts in *Barron*, the entire jury charge in the instant case is even more harmful because there was less evidence of prescription intoxication here than in *Barron*. *Compare Barron v. State*, 05-09-00589-CR, 2010 WL 2183281, at *2 (Tex. App.—Dallas May 27, 2010), *aff'd*, 353 S.W.3d 879 (Tex. Crim. App. 2011) (arresting officer testified, incorrectly, prescription found is a depressant which can cause clues of intoxication he observed), *with* 6RR78-81 (Coapland realizing he is not trained to detect prescription intoxication, and admitting clues of intoxication observed on Burnett would be inconsistent with hydrocodone intoxication).

Two things are important about the state of the evidence in the case at hand. First, no relevant, reliable evidence of drug intoxication existed.[10] Unlike the jury, the trial judge is trained to understand what probative

[10] *See Layton v. State*, 280 S.W.3d 235, 242 (Tex. Crim. App. 2009) (requiring reliable, relevant expert testimony to link prescription possession with prescription intoxication).

evidence is and is not. *See Tolbert v. State,* 743 S.W.2d 631, 633 (Tex. Crim. App. 1988); *Morgan v. State,* 692 S.W.2d 877, 879 (Tex. Crim. App. 1985); *Keen v. State,* 626 S.W.2d 309, 314 (Tex. Crim. App. 1981). This is why courts have entrusted trial judges to instruct juries about the proper purpose(s) for which certain evidence may be considered. *Rankin v. State,* 974 S.W.2d 707, 713 (Tex. Crim. App. 1996) (holding upon proper request, rule 105(a) of the Texas Rules of Evidence requires a limiting instruction). The only evidence of actual drug intoxication of Burnett came from a drug intoxication lay witness who never should have been permitted to testify about the prescriptions found in the first place.

Worse, after doing some research, that lay witness later corrected himself. Not only did Coapland correct his misunderstanding, but he also acknowledged a reliable publication—published by the only authority (NHTSA) he himself had studied—completely contradicted his opinion. *See* ARIDE*, supra* Note 3, at V–10, VI–15-16 (HGN and VGN would not be seen by someone intoxicated on analgesics like hydrocodone). At the point when Coapland changed his opinion from thinking drugs contributed to Burnett's intoxication to there was "no evidence for this jury to conclude that [Burnett] was intoxicated by anything other than alcohol," the trial court no longer had any relevant, reliable evidence before it to authorize a conviction based on a

prescription intoxication theory. *Burnett v. State*, 488 S.W.3d 913, 919 (Tex. App.—Eastland 2016, pet. granted).

Second, the strength of the alcohol intoxication evidence was relatively low, and strongly contested. Coapland noted only a faint smell of alcohol,[11] a slight slur during only two of countless verbal exchanges,[12] no bloodshot or watery eyes,[13] and a respectful attitude.[14] Burnett walked normally[15] and did not sway or lean while standing.[16] Further, during the actual field sobriety tests, Burnett nearly passed the one-leg stand test,[17] and although he did not pass NHTSA's grading scheme, he did 94% of the requested things correctly on the walk-and-turn test. 6RR44-45. Even though Coapland gratuitously added that he "did not think" Burnett had been drinking and would have preferred to have a chemical test, no breath or blood test was obtained. 5RR171. The sum total of the alcohol-intoxication evidence was low.

Yet, staring the jury in the face was the physical evidence. The video contained an unredacted discussion of the prescriptions found. 5 RR 164;

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[11] 5RR126.

[12] 5RR206-08.

[13] 5RR203-04.

[14] 5RR71.

[15] 6RR7-8.

[16] 6RR6-7.

[17] 5RR147.

SX-1, 2. Even more problematic were the twenty white pills and one blue pill actually offered into evidence. (5 RR 184; SX-7, 8).

For nearly two-and-one-half hours, the jury was able to pass around the pills and discuss whether or not they should be considered. Though it was undisputed Burnett had a prescription for the pills, this Court would be hard-pressed to say they had no effect on the jury's verdict. *See Warr v. State*, 418 S.W.3d 617, 623 (Tex. App.—Texarkana 2009, no pet.) (finding harm when trial court admitted legally possessed "sexually oriented items [to] support [] allegations of indecency with a child by sexual contact").

Third and finally, the State's emphasis on both the definition and the application of intoxication only worsened the harm. Despite Coapland admitting there was no evidence of prescription drug or other substance intoxication, the State still reminded the jury that the charge defined intoxication to include drugs. 6RR148. The prosecutor picked up and showed the pills to the jury while pointing out the self-serving portions of Coapland's testimony where he testified it "might have been" for hydrocodone, 6RR173, and after finding the pills he "didn't know what it was from." 6RR174. Unsurprisingly, the State completely overlooked that Coapland changed his opinion before the second day of his testimony based on some research he

had done. In the context of the two days of evidence, the State made the pills a focal point of its final argument.

There was no evidence to support the jury charge. It erroneously instructed the jury on multiple means of intoxication when the evidence only supported possible intoxication by alcohol. Nevertheless, Burnett's prescription pills were discussed at length in trial as being a possible intoxicant. The erroneous charge thus caused "some harm" to Burnett. Accordingly, the convictions must be reversed and remanded for a new trial.

PRAYER FOR RELIEF

Burt Lee Burnett prays the Court would affirm the decision of the court below.

Dated: December 15, 2016

Respectfully submitted,

/s/Frank Sellers
Frank Sellers
Texas Bar No. 24080305
FRANK SELLERS, P.C.
4200 West Vickery Blvd., Second Floor
Fort Worth, Texas 76107
P (817) 928-4222
F (817) 385-6715
frank@ftworthdefense.com

/s/Allison Clayton
Allison Clayton
Texas Bar No. 24059587
THE LAW OFFICE OF ALLISON CLAYTON
P.O. Box 64752
Lubbock, Texas 79464
P (806) 773-6889
F (888) 688-6515
Allison@AllisonClaytonLaw.com
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), I hereby certify this brief contains 5,546 words excluding the parts exempted by the Rule. This is a computer-generated document created in Microsoft Word, using 14-point typeface for all text, except for footnotes which are in 12-point typeface. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

/s/Frank Sellers

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2016, a copy of the foregoing was served by the Court's CM/ECF electronic service on the following parties:

James Hicks
Britt Lindsey
TAYLOR CO. DISTRICT ATTORNEY'S OFFICE
300 Oak Street, Ste. 300
Abilene, Texas 79062
LindseyB@taylorcountytexas.org

/s/Frank Sellers